No. 79-1144

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., *Petitioner,*

v.

RADCLIFF MATERIALS, INC., JIMCO., INC., AND OKC DREDGING, INC., *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN SUPPORT OF RESPONDENTS BY A. L. BLACK AND DARRELL CAMERON AS AMICI CURIAE

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QUESTION PRESENTED

Whether defendants in federal antitrust actions have a right to seek contribution.

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BRIEF IN SUPPORT OF RESPONDENTS BY A. L. BLACK AND DARRELL CAMERON AS AMICI CURIAE

A. L. Black and Darrell Cameron submit this Brief as *amici curiae* with the consent of all parties hereto.[1] A. L. Black and Darrell Cameron urge this Court to follow the intent of the antitrust laws and deny the use of contribution and claim reduction[2] by defendants in antitrust cases.

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[1] A. L. Black and Darrell Cameron submit with this Brief four letters of consent, one from each of the parties to this appeal.

[2] For the sake of brevity, when the issue of contribution is discussed, it is assumed to include the issue of claim reduction.

INTEREST OF AMICI CURIAE

A. L. Black and Darrell Cameron are two of numerous plaintiffs who are fat-cattle producers-sellers involved in antitrust actions coordinated for discovery purposes before the Honorable William M. Taylor, United States District Court Judge, under the style *In Re Beef Industry Antitrust Litigation*, M.D.L. No. 248 (N.D. Tex.). A. L. Black is a plaintiff in *A. L. Black, et al.* v. *Albertson's, Inc.*, CA2-75-186 (N.D. Tex. filed December 30, 1975) alleging violations of the antitrust laws by various retail food chains. Darrell Cameron is a plaintiff in *Darrell Cameron, et al.* v. *Iowa Beef Processors, Inc.*, 77-192-2 (S.D. Iowa filed July 1, 1977) alleging violations of the antitrust laws by various cattle packers and slaughterers. By order of the district court, dated December 11, 1980, discovery on the merits was ordered to proceed in all cases after an absence of five years of any meaningful discovery.

Both A. L. Black and Darrell Cameron do not have a direct interest in the outcome of this appeal; rather, their interest in M.D.L. No. 248 may be directly affected by this appeal's outcome.[3]

In addition, A. L. Black and Darrell Cameron respectfully submit this brief as *amici curiae* to the Court to express their interests in the contribution issue from

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[3] M.D.L. No. 248's retail food chain case involves thirteen private antitrust actions which, if a right to contribution is promulgated by this Court, will further complicate a complex proceeding by way of multiple filings of cross-claims and third-party complaints. The result will be a lengthy determination of the rights of the parties as to the contribution issue and a further postponement of the determination of and cessation of continuing antitrust violations.

the perspective of antitrust plaintiffs desirous of opposing any possible deterioration of existing antitrust laws and its deterrent effects through a misplaced assertion of a right to contribution.

SUMMARY OF ARGUMENT

The diverse arguments presented on this appeal realistically can be condensed to a single question: Is a rule which results in a relieving of the punitive effect of treble damages to be given supremacy over the Congressional policy holding *in initio* that violators of the antitrust laws are held jointly and severally liable without a right to contribution which would result in mitigating its deterrent effect? *Amici curiae* A. L. Black and Darrell Cameron respectfully submit that it is contrary to the national economic interest to forfeit valuable deterrent effects, would inhibit the imposition of a deterrence factor, stymie settlement negotiations, and frustrate the role of private attorneys-general. Furthermore, a determination by this Court of a right to either contribution or claim reduction would needlessly affix to this Court and its inferior courts the added responsibility of deliberating the scope of rights to contribution. As this brief will demonstrate, "allowance of third-party claims may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation." *Wilson*

M.D.L. No. 248's slaughterer and packer case currently has a petition for writ of certiorari pending before this Court addressing the issue of contribution in antitrust cases. Petition for Writ of Certiorari, *Iowa Beef Processors, Inc., et al.* v. *Meat Price Investigators Ass'n, Darrell Cameron and Don Ludvigson, et al.*, No. 79-1214 (filed Feb. 6, 1980). The determination of the case presently before the Court will be dispositive of the issue presented in Petition No. 79-1214.

P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897, 906 (5th Cir. 1979).

The preservation of the status quo by denial of the right to contribution becomes apparent when the desires of convicted antitrust violators are balanced against the needs of a viable and efficient free market system and the intended goals of Congress in passing antitrust legislation.

ARGUMENT

I. Contribution Eliminates The Deterrence Factor Created By Congress

A. The Threat of Sole Liability for Treble Damages Is the Most Effective Deterrent

In *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), the Fifth Circuit recognized that elimination of the bar to contribution and claim reduction also eliminates Congress' deterrent intent of joint and several liability.

> We conclude, consistent with *prevailing economic theory*, however, that the very possibility of imposition of sole liability has an enhanced deterrent effect.

604 F.2d at 90 (footnote omitted, emphasis added). The court found support for so holding based in the economic belief that management personnel of potential antitrust violators are generally "risk-averse" in that the potential violators are "deterred more by the slight prospect of a large loss than by the strong prospect of a small loss." 604 F.2d at 901 n. 8.

This same "prevailing economic theory"[4] has been the basis for denial of a right to contribution and other means of claim reduction in federal courts. *See Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995, 79,702 (10th Cir. 1979); *Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614 (3d Cir. 1960); *El Camino Gas* v. *Sunglo Glass Co.*, 1977-1 Trade Cases (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969). *See also*, Judge Hanson's dissent in *Professional Beauty Supply* v. *National Beauty Supply*, 594 F.2d 1179, 1189 (8th Cir. 1979).

The certainty that defendant's jury-assessed damages will be mitigated by contribution[5] from numerous other parties creates an atmosphere fostering a desire to "run the risk" of liability to benefit from ill-gotten gains in the short-run and market share increases in the long-

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[4] Economic theory and empirical evidence supporting the hypothesis of "risk-aversity" is summarized in K. ELIZINGA & W. BREIT, THE ANTITRUST REMEDIES 126-129 (1976). *See* AUSTIN, *Negative Effects of Treble Damages Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L. J. 1353, 1357-66; *In Pari Delicto and the Deterrence of Antitrust Violations*, 62 MINN. L. REV. 59, 77-78 (1977); Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682-702 (1978).

[5] As the Fifth Circuit realized below:

> [A] rule prohibiting contribution among antitrust coconspirators not only does not frustrate deterrence *but may well enhance the statute's deterrent effect by preventing a defendant from cutting its losses.*

Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897, 903 (5th Cir. 1979) (emphasis added, footnote omitted).

run.[6] Parties to the illegal agreement will "run the risk" of culpability knowing that treble damages can be shifted to other parties, some of whom may be destined for insolvency, yet secure in knowing that their illegal gains in the short run and increased market share in the future will ensure the "profitability" of collusion.[7] Contribution can therefore become a tool, the secondary effect of which may be the lessening of competition by elimina-

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[6] Again, as stated by the court below:

> We believe it reasonable to assume, however, that even businesses of the purest motives necessarily steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression. Allowing contribution may diminish this prophylactic, chilling effect by reducing the threatening specter of sole liability. Businesses may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated.

Wilson P. Abraham Construction Corp. v. *Texas Industries Inc.* 604 F.2d 897, 905 (5th Cir. 1979). With a right to contribution readily exercisable by members of the market, it may well be that potential competition waiting in the wings will "steer clear" of a market so concentrated that there is a potentiality for collusion. The threat of culpability for unintentional violations may necessitate a business decision to forestall or terminate the decision to enter the market. Due to the potential for liability through contribution, business previously on the fringe waiting to enter the market will reconsider its plans, resulting in a lessening of potential competition.

[7] A result of a contribution rule will be the unintended consequence that firms with smaller profit margins (regardless of their market share) will face insolvency. The marked concentration of the market that will surface will mean a lessening of competition, increased market share for wrongdoers able to weather the storm and a further likelihood that future collusion in a very concentrated market will go undetected with greater longevity. See discussion below.

tion of competitors through the insolvency of smaller participants coerced into following the "leader."

B. Contribution Will Be an Effective Means of Assuring Adherence to the Terms of the Illegal Contract, Combination or Conspiracy

Allowance of a right to contribution will eradicate all deterrent goals where the contract, combination or conspiracy hinge on complete cooperation of the parties. It is beneficial to the illegal contract, combination or conspiracy to maintain those subversive activities for as long as profitable. As stated by Professor Posner:

> Once the agreement is in force, the parties must have effective means of assuring adherence to it. . . . [A seller] might cheat because he lacked confidence that the cartel would endure and saw no advantage in forgoing short term gains for long term gains unlikely to be realized. . . . To control cheating effectively, parties to price-fixing agreements may have to create elaborate machinery for the prevention, detection, and punishment of cheaters — joint sales agencies, systems for reporting trans action prices, penalties for cheating and so forth.

POSNER, ANTITRUST — CASES, ECONOMIC NOTES AND OTHER MATERIALS, 121-122 (1974). Stated another way:

> Regardless of how the price is set or the output restricted there will usually be a strong temptation for individual participants to cheat. An individual firm will typically be aware that if it could successfully reduce its price while all other firms maintained the agreed-upon price, it would be able to substantially expand its sales and profits. . . . [B]ut the ideal situation for each individual firm would be for all other firms to collude on price, while it alone

> competes. Individual firms will be aware of this and to the extent that they do cheat (or attempt to do so), there will be a tendency for the cartel to break down.

SULLIVAN, ANTITRUST §61,163 (1977).

Therefore, to effectuate an efficient oligopoly market or price-fixing arrangement, all members of the contract, combination or conspiracy must cooperate by strict adherence to the agreement. Removal of factors which mitigate against cheating or other breakdowns of the conspiracy prolong their collusive existence and provide a purpose for adherence to agreement terms. The more numerous the participants to the illegal arrangement, the more difficult it is to facilitate the venture. However, if the members privy to the antitrust violation will be liable for contribution, it will become beneficial to maintain the secrecy of their covert activities.

That is to say, the threat of contribution will mitigate against cheating in favor of prolonged coversive arrangements. Potential liability for contribution prevents the incentive to cheat, for cheating on the arrangement will only bring to light the illegal activity, thereby bringing it to premature exposure or finality. Removal of the incentive to cheat by holding a party to the agreement liable for contribution has the adhesive effect of compliance to terms of the illegal arrangement. In essence, what is boasted by some violators to be the most beneficial deterrence factor — purportedly aiding in adherence to antitrust laws — is in fact an instrument to facilitate the covert illegal operation.

II. Contribution Would Inhibit Settlement Negotiation

A. This Court Promotes Settlement of Complex Antitrust Litigation

Courts have frequently reiterated the importance of settlement in litigation. For example, in *Cotton* v. *Hinton*, 559 F.2d 1326 (5th Cir. 1977), this Court recognized:

> [L]itigants should be encouraged to determine their respective rights between themselves. . . . Particularly in class actions, there is an overriding public interest in favor of settlement.

559 F.2d at 1331.[8] This Court has recognized that promoting even partial settlements is consistent with the aims and purposes of the antitrust laws. *Zenith Radio Corp.* v. *Hazeltin Research, Inc.*, 401 U.S. 321, 346-47 (1971), *reh. denied*, 401 U.S. 1015 (1971).

The policy of encouraging settlement would clearly be impeded were this Court to accept contribution in antitrust litigation. As recognized in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969), contribution

> would operate to prevent [a plaintiff from] receiving prompt recovery since no defendant would settle with it if he was to find himself back in the suit as a third-party defendant.

298 F.Supp. at 1346.

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[8] *See also Van Bronkhurst* v. *Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *Columbia Pictures Industries, Inc.* v. *Schneider*, 435 F.Supp. 742, 747 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1288 (2d Cir. 1978).

No antitrust court has been willing to accept contribution as appropriate against settling defendants. Even the majority opinion in *Professional Beauty Supply* v. *National Beauty Supply*, 594 F.2d 1179 (8th Cir. 1979), the only circuit court case allowing contribution and not involving a settling defendant, recognized that a rule favoring contribution will necessitate a bright line determination to protect the rights of settling defendants (citing authorities which would deny contribution against settling defendants). 594 F.2d at 1184.[9]

Though not precedent, the Manual for Complex Litigation does represent the accumulated knowledge of some of today's most respected and experienced judges and other lawyers. According to these authorities, "[the] potential discovery in [antitrust] cases may be extensive and expensive so that early settlement discussions may be in the best interests of all concerned." MANUAL FOR COMPLEX LITIGATION ¶ 1.21, 18 (1977). Such early discussions are rarely, if ever, the product of the efforts of all defendants.[10]

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[9] Even non-statutory cases support denial of contribution against settling defendants. *See, e.g. Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1250 (5th Cir. 1979); *Gomes* v. *Broadhurst*, 394 F.2d 456, 468 (3d Cir. 1968) ("voluntary settlements are to be encouraged and a rule permitting contribution . . . would not work to that end."); *Martello* v. *Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962).

[10] *Amicus curiae* Westvaco Corporation has made the argument that a no-contribution rule would force the settlement of cases on the basis of a pressurized "domino" effect, basically arguing that the stockpiling of settlements forces a party defendant to settle when in fact there is no need. Brief of Amicus Curiae Westvaco Corporation at 11, n. 19. However, in a recent Senate Judiciary report, George F. Kress, chairman of the board of Green Bay Packaging Co., Inc., testified before the Committee on the

To permit contribution against settling defendants could force defendants to litigate these cases as long as even one of the defendants wishes to take the risk of trial. Greater investments of time and money will accordingly be shouldered not only by the parties, but also by the court. Once these investments exceed the amount at which the parties could have settled the litigation, even prudent businessmen may well feel compelled to justify their investments by trying to obtain a judgment in their favor. Under such circumstances, both partial settlements and group settlements would prove impossible to obtain.

The result will be that settling defendants would be forced to shoulder burdens of litigation against their will

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Judiciary of the United States Senate on Senate Bill No. 1468, that his company's decision would not have been affected by the availability of contribution or of mandatory claim reduction. When pressed by Senator Baucus whether mandatory claim reduction would have solved his company's problem, Mr. Kress admitted that it would not, stating:

> [B]ecause my liability would still be $75 million to $80 million, so I would be faced with a decision. My creditors would be off my back. I wouldn't have to worry about them. But the family eggs would all be put out on what the jury might do. I am afraid if I were faced with that, I would still have to settle.

Senate Comm. on the Judiciary, Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights, The Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. 45 (1979). The testimony of Mr. Kress and the conclusion of the Committee on the Judiciary demonstrate that settling defendants make the decision not by pressure, but rather due to the high risk imposed by convincing evidence of illegal activities and what effect that will have on the jury award prior to it being trebled. In terms expressed by the Committee, "settling defendants are hardly pushed to the wall by plaintiffs' demands." Senate Comm. on the Judiciary, Report on S.1468 by the Comm., the Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. 36 (1979).

because of the threat of contribution. The Fifth Circuit argued strongly against permitting non-settling defendants to use the "backstop" of settling defendants' assets to support both their continuing litigation efforts and ensure against any potentially adverse judgment which exceeds the protection which the settlements already afford. In *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), defendants attempted to obtain more benefit from the settlement than the court felt was permitted under admiralty comparative computations. In rejecting their request, this court held:

> We refuse to adopt an approach which would reward a defendant for refusing to settle. If a party decides to try a case, it must be prepared to accept whatever benefits or burdens flow from the decision.

592 F.2d at 1251. Similar logic should be applied in affirming the Fifth Circuit's dismissal of the claims for a right to contribution in this case.

B. The No-Contribution Rule Encourages Swift and Inexpensive Determination of the Litigation

Settlements play a crucial role in complex litigation. In *Cotton* v. *Hinton*, 559 F.2d 1326 (5th Cir. 1977), the Fifth Circuit discussed the "overriding public interest" in favor of settlements:

> In these days of increasing congestion in the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial sources.

559 F.2d at 1331.[11] When parties are eliminated from the

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[11] *See also Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910); *Miller* v. *Republic National Life Insurance Co.*, 559 F.2d

litigation at an early stage, there is a substantial savings to all parties involved, including the court, in litigation costs. *See Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *Flintkote Co.* v. *Lysford*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); MANUAL FOR COMPLEX LITIGATION ¶ 1.46, 62-63 (1977).[12]

Settlements play an important and practical role in the efficient prosecution of any complex multi-party antitrust litigation because, among other reasons, they facilitate the emergence of the truth about the conspiracy. Typically, settling defendants agree to cooperate with plaintiffs, to tell the honest and complete truth, and thus assist plaintiffs in reassembling the conspiracy. Absent such cooperation, discovery expenses would drastically increase and antitrust enforcement would be severely frustrated. Defendants would be likely to close their ranks as well as their mouths until the dozens or hundreds of claims and cross-claims have been litigated. The encouragement of settlements would provide a limitation on lengthy litigation through the narrowing of issues and elimination of extensive and useless discovery, implementing the use of evidence provided by "an insider" to the contract, combination or conspiracy. The

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426, 428 (5th Cir. 1977); *Florida Trailer Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

[12] Of the 1,307 private antitrust cases terminated in 1978, only eight percent reached trial. Five hundred thirty-seven were terminated with no court action, and three hundred ninety-five more were terminated before pretrial procedures began. SEE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS Table C-4 (1978). A reasonable assumption is that a large percentage of these terminations involved settlements between the parties.

exchange of a settlement reflecting an assessment of damages incurred in return for compelling evidence of the conspiracy involves a trade-off which would vanish under a right to contribution rule. *See In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647, 648 (D.D.C. 1979).

Without the possibility of settlement, plaintiffs would be unlikely to obtain prompt recovery of their losses, *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969). Additionally, litigation vested with great expenditures of time and money on the part of plaintiffs will result in reconsideration of whether antitrust violations should be prosecuted or whether the plaintiff and its attorneys would come to the point of financial frustration or ruin culminating in abandonment of legitimate complaints due to the inability to finance such a venture.

III. Contribution Gives Rise To Complexity And Unmanageability In Antitrust Litigation, Impeding The Goals Of Congress

A. A Right to Contribution Would Restrain Manageability, Fostering Abandonment of the Role of Private Attorneys-General

Manageability of antitrust class actions is critical both to securing the justy, speedy and inexpensive determination of every action, FED. R. CIV. P. 1, and to encouraging the commencement of actions by private attorneys-general. The right to contribution would destroy manageability by burdening the court with a multitude of actions and by taking control of the case out of the plaintiff's hands. The courts have frequently cited manageability as a compelling reason for the no-contribution rule. *El Camino Glass* v. *Sunglo Glass Co.*,

1977-1 Trade Cases (CCH) ¶ 61,533, 72,112 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969).

Antitrust law policy dictates that private claimants be encouraged to bring lawsuits because, as this Court has underscored, such litigation is the "bulwark of antitrust enforcement," *Perma Life Mufflers, Inc.* v. *International Parts Co.*, 392 U.S. 134, 139 (1968).

> [T]he purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

To this extent, this Court has fully endorsed the need to eliminate complexities which would discourage private enforcement of the antitrust laws.[13]

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[13] These considerations led the Supreme Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to hold that indirect purchasers have no cause of action under Section 4 of the Clayton Act. Indirect purchasers have been denied a cause of action due to the "costs to the judicial system and the efficient enforcement of the antitrust laws" imposed by the "complexities and uncertainties" raised by their claims. 431 U.S. at 732 and 740-45. Similar to indirect purchasers' actions, allowing contribution in antitrust cases "would tranform treble-damages actions into massive multi-partied litigations" (431 U.S. at 740), a change which should not be permitted unless Congress feels the new cause of action is warranted (431 U.S. at 734 n. 14 and 746).

The Tenth Circuit appreciated the litigation problems associated with the issue of contribution by citing with approval the dissent of Judge Hanson in *Professional Beauty Supply Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1190 (8th Cir. 1979):

> The potential for confusion, delay, and complexity inherent in permitting antitrust defendants to implead other alleged violators (who may distort the litigation because of their size, nature of involvement, or position in the marketplace) would deter private plaintiffs of relatively limited means from bringing or maintaining a meritorious suit. Although district courts have the power to superintend complex litigation, the

In view of the important role which private litigants play in antitrust law enforcement, it is imperative that new stumbling blocks such as contribution not be thrown in plaintiffs' path. The litigation of nationwide antitrust conspiracies is difficult enough for the court and plaintiffs to manage as it is. Judge Singleton has noted the "already notorious complexity and unmanageability of antitrust cases," *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex. 1979), and the Fifth Circuit has observed that these suits are "most complex." *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Elimination of the no-contribution rule would give rise to the proliferation of cross-claims and third-party actions. The burden of managing all these claims would be felt not only by the plaintiffs[14] but also by the court itself.[15]

> multiplication of issue and parties must, nevertheless, be dealt with. The chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977),

Olson Farms Inc. v. Safeway Stores, Inc., 1979-2 Trade Cases (CCH) ¶ 62,995, 79,703 (10th Cir. 1979).

[14] As stated by a partner of a prominent antitrust defense firm, extensively involved in nationwide conspiracy antitrust cases, conceding that contribution is unworkable:

> To allow contribution among conspirators would, however, add new complications to the inextricable maze of antitrust litigation. . . .
>
> * * *
>
> . . . To permit defendants to seek contribution from one another would, however, greatly complicate antitrust litigation which is already labyrinthine. Plaintiffs might lose control of their cases with defendants vouching in other members of the industry and filing cross-claims against one another.

IZARD & MILLER, *High Price-Fixing Rewards Require Abolition of Joint, Several Liability*, 1 NAT'L L. J. 22, 23 (Aug. 27, 1979).

[15] A right to contribution will leave the court to deal with numerous claims among defendants even after every defendant had

B. Contribution Gives Rise to Illusory "Fairness"

Many violators, finding themselves facing treble damage awards after having committed grievous antitrust violations, assert that it is "unfair" for them to face awards which a jury appraises to be the damages incurred by the plaintiff as a result of the actions of the defendant. This after-the-fact, defense-oriented attitude misses the point.[16] Defendants-violators' actions were the cause-in-fact of plaintiff's injuries. Acting in unison, defendants promulgated an illegal act which deprived the plaintiff of a free market price. After the damage has been incurred, these parties, which freely consented to the antitrust violation, now wish to tell this Court that

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made its forestalled peace with the plaintiffs and plaintiffs were no longer before the court, as well as the insurmountably complex variations in which contribution may be invoked by defendants.

[16] Congress' intention in passing antitrust legislation was not whether the antitrust laws would impose "fairness" upon the defendant, but was intended to deter antitrust violations, compensate victims and deprive violators of the fruits of their illegality. *See Pfizer* v. *Government of India*, 434 U.S. 308, 314 (1978). To implement the deterrence factor, Congress refused to concern itself with whether sole liability for damages incurred as a result of the conspiracy was "fair." Congress, in passing antitrust laws, and the courts, in interpreting antitrust laws, have as their primary goal the economic interests "of the United States, upon whose trade and commerce the effects of the conspiracy are alleged to have fallen." *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1343 (S.D.N.Y. 1969). To suggest that this Court should seek to overrule the ninety-year-old deterrent effect intended by Congress in implementing the antitrust laws because it has the minor consequential effect of being "unfair" to a party which set in motion a devastatingly injurious conspiracy affecting the entire market of a product is unconscionable.

the jury's finding against them is "grossly unfair." However, a jury's finding of consent to an agreement to violate the antitrust laws finds that the parties incident to the agreement impliedly consented to joint and several liability and the possibility of being held solely accountable for the total damage of its actions. Post verdict, the parties seeking contribution now hope to abrogate the maxim of *volenti non fit injuria*. This Court's refusal to find a right to contribution will enhance the punitive effect of the antitrust laws by finding that wilful consent to perform an illegal contract, combination or conspiracy implies consent to the consequent sole liability for all damages incurred.

IV. This Court Should Defer To Congress The Decision Of The Appropriateness Of Creating A New Rule Permitting Contribution

This Court and lower federal courts have held that Congress is far better suited to consider the wisdom of a cause of action for contribution in no way suggested by existing legislation. In light of this well-established principle, this Court should determine that there is no right to contribution or claim reduction.

In *Halcyon Lines* v. *Haenn Ship Sealing & Refitting Corp.*, 342 U.S. 282 (1952), the Supreme Court held:

> In the absence of legislation courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.
>
> . . . .
>
> *We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution*

> *and that the resolution of this problem should await Congressional action.*

342 U.S. at 285 (emphasis added).[17]

Indeed it appears that Congressional intent upon adoption of the Clayton Act in 1914 was not consistent with contribution. The report of the Committee on the Judiciary of the United States Senate on S. 1468 notes that the proposed bill would "supply the appropriate Congressional intent" which courts have perceived as lacking.

Many parties to this appeal have argued that to allow contribution would only be consistent with the growing national trend of contribution in other areas. However, antitrust courts have consistently held that Congress should determine whether or not to develop a new rule permitting contribution. In *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp 1339 (S.D.N.Y. 1969), the party seeking contribution argued that securities cases supported its argument that

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[17] This Court also specifically deferred to Congress in another antitrust case when faced with the question of whether a policy argument was sufficient to preclude consumer causes of action under the provisions of Section 4 of the Clayton Act (15 U.S.C. §16 [1976]). *Reiter* v. *Sonotone Corp.*, _____ U.S. _____, 99 S.Ct. 2326 (1979). The Fifth Circuit below echoed the pronouncement of Reiter:

> Those aggrieved by this decision always have recourse to Congress, *a forum better suited to evaluation of the competing interests and policies involved.*

Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897, 906 (5th Cir. 1979), *rehearing and rehearing en banc denied* (5th Cir. Nov. 29, 1979) (emphasis added). *See also In re Beef Industry Antitrust Litigation*, 1980-1 Trade Cases (CCH) ¶ 60,021, *en banc hearing denied* (5th Cir. Dec. 21, 1979).

the "no-contribution" rule should be changed in antitrust cases:

> Congress, aware of the rule against contribution saw fit to provide for it explicitly in the securities statutes but not in the enforcement of antitrust laws which dominate so much of our litigation, and . . . no such right should be implied.

298 F.Supp. at 1345.[18]

Any decision to permit contribution would involve substantial changes in antitrust policies. This Court has explicitly recognized in *Reiter* that such policy consideration should be addressed to Congress, not the courts. A more appropriate forum would be Congress who will be able to provide comprehensive consideration of the multiplicity of factors and consequences involved in contribution. In light of this and other pronouncements of this Court, this Court should refuse to grant contribution, or any other right to claim reduction, and rather defer to Congressional action.

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[18] *See also Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995, *en banc rehearing granted* (10th Cir. Dec. 27, 1979). *Baughman* v. *Cooper-Jarrett, Inc.*, 391 F.Supp. 671, 678 n. 3 (W.D. Pa. 1975), *rev'd in part on other grounds*, 530 F.2d 529 (3d Cir. 1976), *cert. denied*, 429 U.S. 825 (1976). The conspicuous absence of any provisions relating to contribution in the antitrust statutes is indeed significant, for this Court has continually noted that:

> Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly. *Touche Ross & Co.* v. *Redington*, _____ U.S., at _____, 99 S.Ct., at 2487; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S., at 734 95 S.Ct., at 1924; *See Amtrak*, 414 U.S., at 458, 94 S.Ct., at 693; *T.I.M.E., Inc.* v. *United States, supra*, 359 U.S., at 471, 79 S.Ct., at 908.

Transamerica Mortgage Advisors, Inc. v. *Lewis*, _____ U.S. _____, _____, 100 S.Ct. 242, 248 (1979).

CONCLUSION

For the foregoing reasons, as well as in the interests of assuring effective enforcement of the federal antitrust laws, ensuring even-handed administration of justice, and protecting the existence of a competitive and free market system, the *amici curiae* respectfully request that this Court follow the intent of the antitrust laws and deny the use of contribution and claim reduction by defendants in antitrust cases.

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